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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

GLEN M. CLARKE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 590 F.2d 765. The opinion of the district court (Pet. App. D) is unreported. The opinion of the court of appeals on a previous appeal (Pet. App. E) is reported at 529 F.2d 984. The district court's prior opinion (Pet. App. F) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on January 15, 1979. By order of April 10, 1979, Mr. Justice Rehnquist extended the time within which to file a petition for certiorari to

and including May 10, 1979. The petition was filed on May 10, 1979, and was granted on October 1, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 25 U.S.C. 357 authorizes a state or local government to "condemn" allotted Indian trust lands by physical occupation.

STATUTES INVOLVED

Section 3 of the Indian Appropriation Act of March 3, 1901, ch. 832, 31 Stat. 1084, 25 U.S.C. 357, provides in pertinent part:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Section 1 of the Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304, 28 U.S.C. 2415, provides in pertinent part:

> § 2415. Time for commencing actions brought by the United States
>
> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six

> years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: * * * *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued. * * *.
>
> (b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States * * * may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues * * *.
>
> (c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.
>
> * * * * *
>
> (f) The provisions of this section shall not prevent the assertion, in an action against the

United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. * * *.

STATEMENT

1. The chronology of this case begins in 1954 after Bertha Mae Tabbytite had settled on the land in question, some 160 acres in the Chugach Mountains, southeast of Anchorage, Alaska. Although an American Indian entitled to a special allotment of public land (see 25 U.S.C. 334, 336), Mrs. Tabbytite initially sought to perfect a claim under the homestead laws. She filed her first application in 1954 and refiled two years later (Pet. App. 12a). In June 1958 Glen Clarke and his wife applied for a homestead on an adjoining 80 acres and two months later constructed a road across Tabbytite's land (Pet. App. 12a, 17a). They obtained no easement for the road (Pet. App. 18a) and it is now settled that the road could not be justified as a "way of necessity" (Pet. App. 13a-15a).

The Clarkes repeatedly contested Tabbytite's homestead application (Pet. App. 12a, 17a). They, however, secured a patent in 1961, and subdivided their acreage into 40 lots. That same year the area was incorporated as part of a third class city, Glen Alps

(Pet. App. 12a, 17a).[1] Mrs. Tabbytite, on the other hand, was unsuccessful both in her efforts to prevent the continuing trespass over her land (Pet. App. 13a) and in her several attempts to obtain a homestead patent (Pet. App. 12a ,17a). Ultimately, in 1966, she agreed to accept a restricted trust patent to the 160 acres as an Indian allotment (Pet. App. 12a-13a, 17a). As a consequence, Mrs. Tabbytite may neither sell nor encumber the land during the life of the trust, which may be extended without her consent. Meanwhile legal title remains in the United States. 25 U.S.C. 348. In 1969, the United States filed the present action to enjoin the use of the road across the Tabbytite allotment and for damages.

2. By an order entered in October 1973, the district court awarded damages for trespass but denied the injunction (Pet. App. 19a-21a). The court concluded that the road was "a way of necessity" and that closing the road would cause undue "hardship" to the defendants (Pet. App. 18a-19a). That determination was reversed on appeal and the case was remanded (Pet. App. 11a-15a). However, this was not to be the end of the matter.

By this point, February 1976, the Municipality of Anchorage had annexed Glen Alps and apparently taken over the road crossing the Tabbytite allotment

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[1] In an opinion dated November 9, 1976 (Br. of Anchorage on Appeal in No. 77-2571, Exh. A), the district court held that as a third class city, Glen Alps lacked the power of eminent domain and therefore could not, prior to unification with Anchorage, have effected a taking.

(Pet. App. 8a). On remand, the Municipality entered the proceedings and opposed the injunction on the ground that it had effectively exercised its power of eminent domain by "inverse condemnation" (Pet. App. 8a-9a). The United States argued that the federal statute invoked for consent to condemn an Indian allotment held in trust did not authorize inverse condemnation. The district court rejected the government's submission and relegated Mrs. Tabbytite to an action for just compensation (Pet. App. 8a-10a). The court of appeals agreed and affirmed (Pet. App. 1a-5a).

SUMMARY OF ARGUMENT

Land allotted in trust to Indians cannot be condemned by mere physical seizure. When 25 U.S.C. 357 was enacted seventy-eight years ago, the term condemnation signified a judicial or quasi-judicial proceeding brought by a condemnor against the owner of the desired property. Both federal and state courts entertained proceedings in equity to recover land from states, railroads and the like who sought to occupy the land without instituting condemnation proceedings. This is not to say that governmental entities could not or cannot acquire property by means other than condemnation or purchase. Takings occur whenever the government through inadvertence or mistake occupies or destroys another's property. But such takings by occupation or seizure were not, and are not today, the legal equivalent of condemnation proceedings. And they are not encompassed by Section 357.

The court of appeals' reading of Section 357 as authorizing takings by seizure would lead to illogical results. If a state commences a proceeding to condemn an Indian trust allotment, the United States is an indispensible party. *Minnesota* v. *United States*, 305 U.S. 382 (1939). Yet, if takings by seizure were permitted, allotted land could be acquired without the government even becoming aware of the taking, much less having an opportunity to challenge whether it is authorized and the extent to which it is necessary. Moreover, allotted lands could be acquired by what amounts to adverse possession. A state could acquire such lands, *inter alia*, by remaining in possession until an action for damages becomes time-barred, thus avoiding payment of any compensation whatsoever. This is at odds with a statute providing in effect that the running of a statute of limitations cannot extinguish the United States' title to land (28 U.S.C. 2415 (c)), which, in a case like this one, presumably carries with it the right to place restrictions on alienation and encumbrances. Furthermore, under the decision below Indian allottees could well be barred by the Eleventh Amendment from recovering compensation for seized land where the state is the would-be condemnor and the allottee in his or her own right brings the "inverse condemnation" proceeding.

Finally, if left undisturbed, the decision below would impose a substantial burden on the United States in its role as trustee of Indian lands, and an even greater burden on the Indians themselves. The ultimate hardship would be, of course, the loss of

land without any compensation. That is a very real possibility for thousands of Indians who must discover when a state or a municipality has occupied part of an allotment, determine whether a compensable taking has occurred, decide how to proceed to protect their interests, locate counsel, and commence an action for just compensation before it is time-barred. This is no mean task since Indians frequently do not reside on their allotments, allotments are often remote, boundaries are uncertain, and counsel is not always available.

Even allottees who managed to bring timely suits for just compensation would be disadvantaged by the decision below. Their recovery would be based on the value of their land at the time of the state's entry, rather than at the time compensation is determined. The same factors that would cause some allottees to lose their right to compensation altogether would delay others to the point that the discrepancy in recovery would be substantial.

The United States of course has an obligation as trustee to guide Indian allottees through this legal thicket. However, as this Court has recognized, the government "is faced 'with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments,'" *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968), quoting H.R. Rep. No. 2503, 82d Cong., 2d Sess. 23 (1952). That problem is exacerbated by a construction of Section 357 that permits states to encroach on trust lands without

apprising either the United States or the allottee, and that in fact creates substantial incentives for states to minimize the likelihood of discovery and maximize the delay in any proceeding for compensation.

ARGUMENT

25 U.S.C. 357 DOES NOT AUTHORIZE A STATE TO CONDEMN A ROAD ACROSS AN INDIAN ALLOTMENT WITHOUT BRINGING A PROCEEDING IN A UNITED STATES DISTRICT COURT

For the present, we indulge the assumption that 25 U.S.C. 357 authorizes the acquisition of a right of way for road purposes through restricted Indian land by direct judicial condemnation proceedings, and confine ourselves to the proposition that the cited statute does not permit that result to be achieved by so-called inverse condemnation.[2] Of course, if the Court accepts our submission, there will be no more occasion here to decide the correctness of that assumption than there was in *Minnesota* v. *United States*, 305 U.S.

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[2] The unilateral occupation or seizure of property followed by payment of just compensation has, in recent years, been labelled "inverse condemnation." It is perhaps more accurate to refer to this process as the inverse *of* condenmation. In a condemnation proceeding, property ordinarily is taken pursuant to a judgment and upon payment of compensation. Property inversely condemned is taken prior to any judicial proceeding and prior to the payment of compensation. A condemnation proceeding is brought by the condemnor against the property to effect a taking and acquire title. An inverse condemnation proceeding is brought, if at all, by the property owner against the government and is limited to determining just compensation.

382, 391 (1939). For that reason, we have not debated the question whether Section 357 is wholly unavailing to the would-be acquirer of a road right of way because that special matter is exclusively governed by 25 U.S.C. 311 or 25 U.S.C. 323-328. But our silence should not be understood as expressing a concluded view in opposition to the argument advanced by separate counsel on behalf of Mrs. Tabbytite.[3]

A. The Term "Condemnation" Means A Judicial Proceeding To Acquire Property Brought By An Entity Possessed Of The Power Of Eminent Domain

1. The term "condemn" is not defined in 25 U.S.C. 357 or in any other provision of the Indian Appropriation Act of March 3, 1901. Nor is there any helpful legislative history. The language that was to become Section 357 was not part of the original bill and was inserted, without comment or discussion, on the Senate floor. 34 Cong. Rec. 1448 (1901).[4] Nevertheless, we have a strong indication of congressional intent in the usage and practice of the time.[5]

[3] Mrs. Tabbytite intervened in the original proceedings in the district court (see Pet. App. 11a, 16a-17a) and has participated as a separate party ever since. Not having petitioned, she is a respondent in this Court (Rule 21(4)), albeit aligned with the United States, petitioner.

[4] Section 3 of the Act, to which the language of Section 357 was added, was discussed briefly in the House Report on H.R. 12904, H.R. Rep. No. 2064, 56th Cong., 2d Sess. 3 (1900): "Fifth. Providing for the opening of highways through like lands under State and Territorial laws *and upon the payment of compensation*" (emphasis added). The italicized phrase suggests that simultaneous compensation was

At the turn of the century, when Section 357 was enacted, it was generally understood that in order for land to be condemned, the would-be condemnor must institute a judicial proceeding. Thus, in a case similar in many important respects to that at bar, a landowner brought suit for rent and ejectment against a railroad which possessed the power of eminent domain. The railroad had occupied a right of way across the landowner's property without commencing a judicial proceeding or paying just compensation. This Court rejected the railroad's suggestion that the landowner's suit be treated as a condemnation proceeding, and gave the railroad six months in which to bring a true condemnation action or face ejectment. *Winslow* v. *Baltimore & Ohio R.R.*, 188 U.S. 646, 660-661 (1903).[6]

Similarly, the states limited condemnation to judicial proceedings, and devised various means of channelling those who sought to acquire land by physical occupation into the courts. For example, in Ohio, Wisconsin and South Carolina, a landowner could

envisoned, which is inconsistent with the concept of taking by seizure.

[5] Resort to contemporaneous usage is, of course, a well established means of divining Congressional intent. See, *e.g.*, *United States* v. *Wise*, 370 U.S. 405, 409-411 (1962).

[6] This was in line with then-prevailing federal law which allowed a suit for ejectment against federal authorities who took possession of land without bringing a condemnation proceeding. *United States* v. *Lee*, 106 U.S. 196 (1882).

bring an action to compel an occupier of land to condemn the land. *Fries* v. *Wheeling & Lake Erie Ry. Co.*, 46 N.E. 516, 520 (Ohio 1897); *Stewart* v. *Milwaukee Elec. Ry. & Lighting Co.*, 86 N.W. 163 (Wis. 1901); *Charnley* v. *Shawano Water Power & River Improvement Co.*, 85 N.W. 507, 508-509 (Wis. 1901); *Parrish* v. *Yorkville*, 79 S.E. 635, 636 (S.C. 1913). And in Illinois, a landowner could sue for ejectment, without prejudice to the possessor's right to bring a condemnation proceeding. *Russell* v. *Chicago & Milwaukee Elec. Ry. Co.*, 68 N.E. 727 (Ill. 1903).

To be sure, then as now, property was sometimes effectively taken without resort to the courts. For example, where land was inadvertently occupied or destroyed by an entity having the power of eminent domain, the property was deemed taken and just compensation had to be paid. See, *e.g.*, *United States* v. *Lynah*, 188 U.S. 445, 468-469 (1903). However, such instances were deemed truly exceptional at the turn of the century. And a sharp distinction was made between such "takings" on the one hand, and "condemnation" on the other. See, e.g., *United States* v. *Lynah*, *supra* at 462, 467, 468; see also *id.* at 478 (Brown, J., concurring).

In sum, considering the views then prevailing, it must be deemed most unlikely that Congress in 1901 meant to condone self-help when it authorized the "condemnation" of Indian allotted land.

2. Nor has the distinction between a unilateral "taking" and judicial "condemnation" been erased in

more recent times. Even today, the term "condemnation" is usually reserved for the procedure under which property is acquired by an eminent domain action filed in court. Thus, in *United States* v. *Dow*, 357 U.S. 17, 21 (1958), this Court observed that "[b]roadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings." In other words, there are two different "classes of 'taking' cases—condemnation and physical seizure * * *." *Ibid.* See also *United States* v. *Dickinson*, 331 U.S. 745, 747-748, 749 (1947).

The two classes of taking are not legally equivalent. And the practical differences remain significant. A taking by seizure offers the property owner no opportunity to challenge the authority for the taking or the extent of its necessity. Such rights are important safeguards against government overreaching and mistake, as evidenced by the fact that in the instant proceeding, the City of Glen Alps occupied the road across Mrs. Tabbytite's property for fourteen years without being entitled to exercise the power of eminent domain.

The two modes of taking also differ in terms of when title passes. A taking by seizure does not vest title in the taker. *United States* v. *Dow*, *supra*, 357 U.S. at 21-22; *United States* v. *Lynah*, *supra*, 188 U.S. at 470-471. Instead, title passes when compensa-

tion is paid or the statute of limitations runs. *Ibid.* The time elapsed between a taking by seizure and payment of compensation may, as illustrated by the instant case, span years, or even decades. On the other hand, when condemnation proceedings are instituted, the taking does not occur until judgment and therefore the taking and the vesting of title are simultaneous. This distinction leads to quite different results in terms of the valuation of property and the nature of the property interest acquired. See Point B, *infra* at 16.

The two modes of taking differ in another significant respect. In a taking by condemnation the burden is placed on the condemnor to notify the party whose property is sought and to invoke the aid of a court in determining just compensation. If the condemnor is not diligent, the property owner may retain full use of and title to his or her property. By contrast, where a taking is accomplished by seizure, the property owner loses the use of the property at the outset, has the burden of bringing an action for payment of just compensation, and runs the risk of receiving no compensation at all if the statute of limitations runs. See Point C, *supra* at 20.

Finally, Congress itself has recently distinguished between the two classes of taking in providing for the award of litigation expenses under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.* In "a proceeding instituted by a Federal agency to acquire real property by condemnation" (Section 4654(a)), the landowner may receive costs and attorneys' fees only

if the United States abandons the proceeding or is adjudged to lack authority to acquire the property. However, a landowner forced to sue for damages for a physical taking of property by the federal government is routinely entitled to an award of costs and fees (Section 4654(c)). This statutory scheme not only reflects the historic distinction between takings by condemnation and takings by seizure; it manifests a clear Congressional intent to encourage the former and discourage the latter.

The State of Alaska has likewise expressed a preference for condemnation proceedings over physical takings. In a 1967 Opinion involving damages to a landowner's property resulting from changes in the grade of a roadway, the Attorney General discussed the condemnation versus seizure question, relying in part on the same Alaska Supreme Court case as did the court below.

> A careful reading of the *Crosby* case indicates that the Supreme Court of Alaska does not give blanket approval to inverse condemnation actions. The Court relied upon the good faith of the State in not instituting a condemnation action but did not give the State carte blanche authority to ignore the provisions of both the

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[7] In *Department of Highways* v. *Crosby*, 410 P.2d 724 (Alaska 1966), the court held that where the state seized private land in the mistaken but good faith belief that a right-of-way had been reserved in the patent to the land, and where the landowners had entered into a stipulation with the state acknowledging the taking and fixing the date on which the property was to be valued for compensation purposes, it would be "unrealistic" to require the state to institute a formal condemnation proceeding. Id. at 728-729.

> Alaska statutes and constitution while appropriating private property. Thus, it can be stated that when the State believes it has taken an individual's property, the State should institute a condemnation proceeding. A property owner entitled to just compensation should never be put in the position of having to resort to inverse condemnation proceedings in order to collect his compensation.

1967 Op. Atty. Gen. No. 2.

The important differences between unilateral takings and judicial condemnation, and the policy, national and state, of preferring the more regular mode, suggest that Congress would not casually authorize either procedure indifferently. Even today, authority to "condemn" would most reasonably be read as requiring resort to the judicial process. All the more so, we may suppose, in the more formal and less hurried climate of 1901.

B. Reading 25 U.S.C. 357 To Authorize Takings By Seizure Leads To Illogical Results

1. The decision below, expanding the term condemnation to encompass takings by seizure, leads to illogical results. First, it renders nugatory qualifications placed by this Court on the right of states to proceed under Section 357. In *Minnesota* v. *United States*, 305 U.S. 382 (1939), a unanimous Court, speaking through Mr. Justice Brandeis, held that states bringing condemnation suits under Section 357 must do so in federal rather than state courts, and must join the United States as an indispensable party.

The Court concluded that there are "persuasive reasons why [Section 357] should not be construed as authorizing suit in a state court" (*id.* at 389). Yet, here a state subdivision was permitted to acquire allotted land without resort to *any* court. What is more, whereas this Court concluded that "no effective relief can be given in a proceeding to which the United States is not a party" (*id* at 386 n.1), the court of appeals in this case sanctioned a mode of taking that requires no proceeding at all and that fails even to apprise the United States that a taking has occurred.

2. Even more disturbing, the decision below would permit states, under certain circumstances, to acquire allotted lands without payment of any compensation, something that could never happen under the approach sanctioned in *Minnesota* v. *United States*.[8] Indeed, if it be lawful for a state or municipality to take possession of part of an Indian allotment, the statute of limitations presumably begins to run on the allottee's right to sue for just compensation from the time of physical occupation.[9] And if no suit is brought by the end of the limitation period, the state presumably acquires the land, free of any obligation to make payment.

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[8] Moreover, that result would seem to disappoint the express expectation of Section 357 that "the money awarded as damages shall be paid to the allottee."

[9] It is not clear whether under Section 357 state statutes of limitation govern or the federal statute (28 U.S.C. 2415) is applicable. That issue, however, is not involved here.

Such a result, however, does not tally with the rule announced in 28 U.S.C. 2415(c). That Section provides that, without regard for time limitations, the United States can bring an action "to establish the title to, or right of possession of, real or personal property." The statute was designed to assure that "no one can acquire title to Government property by adverse possession." S. Rep. No. 1328, 89th Cong., 2d Sess. 3 (1966); cf. *Texas* v. *Louisiana*, 410 U.S. 702, 714 (1973). The United States retains title to lands allotted in trust. Therefore, if 28 U.S.C. 2415 (c) is to be respected, that title cannot be extinguished by an "inverse condemnation" even if an action for just compensation is time-barred. Indeed, it is questionable whether the United States title can be extinguished even if just compensation is paid, where the government is not a party to the damages proceeding or has not had an opportunity during the course of the proceeding to challenge the taking. The continuing federal title would presumably carry with it the power to restrict alienation and limit encumbrances. Thus, even if a state acquired a possessory interest by adverse possession, it might experience difficulty in exploiting it by, for example, making utility line grants along the right of way. No such impasse can have been intended.

3. There is another statute of limitations problem created by the decision below. Where, as here, a governmental taking is "piggy-backed" onto a trespass, either by a private person or by an entity lacking authority to effect a taking, an action for trespass

can be asserted as a counterclaim in a condemnation proceeding no matter when the trespass occurred (28 U.S.C. 2415(f)). However, if takings by seizure are permitted, the burden of bringing a proceeding is on the United States and the Indian allottee, and any trespass claim must be asserted affirmatively. In such circumstances, the claim presumably would be subject to the 6¼ year statute of limitations set out in 28 U.S.C. 2415(b).

4. Finally, permitting takings by seizure would pose yet another hurdle for Indian allottees seeking just compensation. Where the entity seeking land is the state, rather than a municipality, the Eleventh Amendment might bar recovery. In condemnation proceedings no such problem exists since it is the state that invokes the aid of the courts. However, in "inverse condemnation" proceedings, the landowner must sue the state. Since there is no statutory authorization for such proceedings, the state might well prove successful in arguing that it has not consented to be sued. To surmount the obstacle, the United States would be required to act as plaintiff in every case, even though, under Section 357, "the money awarded as damages shall be paid to the allottee." Given the many competing claims on limited governmental resources, this could often delay recovery, to the prejudice of the allottee.

C. Reading 25 U.S.C. 357 To Authorize Takings By Seizure Would Impose Substantial Burdens On The Federal Government And Substantial Hardships On Indian Allottees[10]

In a condemnation proceeding, the condemnor must serve notice on the party whose land is being sought, must serve notice on the United States if allotted land is involved, must spell out the extent of the taking, must demonstrate its authority for and need for the taking, and must pay compensation before the taking occurs. To accomplish a taking by seizure, a state or municipality need only occupy the land. The burden then shifts to the landowner to discover the encroachment and do something about it.

A state may occupy part of an Indian trust allotment for years without being discovered. Indians need not reside on or make use of allotted lands, and many do not. Allotments are often quite remote. Signs of encroachment are not always obvious. A disruptive modern highway may begin as a dusty dirt road or a trail through the wild. Boundaries of allotments are often uncertain since the equitable interest of the allottee does not depend on the land being surveyed or certificated. See *Thomas S. Thorson*, 17 I.B.L.A. 326 (1974). Once an encroachment is discovered, the allottee has the burden of determining whether a compensable taking has occurred. The

[10] Such a reading would therefore run contrary to the general rule that statutes dealing with Indians are to be construed in the Indians' favor. *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976).

party in occupation may be a private trespasser, like Glen Clarke, or a public one, like Glen Alps. The occupation may be temporary, insubstantial, or inchoate. Cf. *United States* v. *Dickinson*, 331 U.S. 745 (1947).

The allottee must then determine how to proceed. If the occupier is viewed as a trespasser, the allottee might attempt, as did Mrs. Tabbytite, some form of self help such as blocking the road or otherwise impeding the occupier's use of the land. The allottee might also try to negotiate with the state or municipality, or to compel the state to negotiate with the Secretary of the Interior pursuant to 25 U.S.C. 311. Particularly when the allottee's aim is to terminate the encroachment and recover the land, a suit for just compensation would likely be his or her last resort. In sorting out these various possibilities, many Indians must overcome cultural barriers that inhibit their ability to comprehend Anglo-American concepts of property and the vagaries of our legal system. Cf. *Calista Corp.* v. *Mann*, 564 P.2d 53, 61 (Alaska 1977). Those who decide to seek legal counsel may well experience considerable difficulty in doing so, particularly in remote areas. Cf. *Aguchak* v. *Montgomery Ward Co.*, 520 P.2d 1352, 1357 (Alaska 1974).

An Indian allottee who fails to discover an encroachment promptly or who, upon discovery, pursues remedies other than a suit for just compensation runs the risk of losing his or her property by what amounts to adverse possession. Once the statute of limitations runs on a damages action, the property interest taken

by seizure passes to the state. *United States* v. *Lynah*, *supra*, 188 U.S. at 470-471. Under such circumstances, the allottee would not only lose the land; he or she would receive no compensation for it.

Allottees who manage to bring timely damages suits would, of course, receive compensation, but they too would be disadvantaged by the court of appeals' reading of Section 357. Assuming rising lands values, the inevitable delay between the date of the taking and the award of compensation [11] would result in a significant discrepancy between what the allottee would recover in a condemnation proceeding and what he or she would recover in an "inverse condemnation" proceeding.[12] For example, were a condemnation proceeding commenced against Mrs. Tabbytite today, her compensation would be based on the land's current

[11] On top of the delay inherent in discovering the taking and determining how to remedy it, ultimate recovery is subject to delays during the course of the damages proceeding. The instant proceeding, albeit not one for just compensation, has dragged on for ten years. Indeed, it is in the state's pecuniary interest to delay such proceedings during periods of inflation since the ultimate compensation is paid in depreciated dollars.

[12] This Court has recognized the appropriateness of an award of interest as a convenient measure of compensation for delay in payment. *United States* v. *Klamath Indians*, 304 U.S. 119, 123 (1938); *Jacobs* v. *United States*, 290 U.S. 13, 17 (1933); *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 306 (1923). However, such interest is designed to compensate for the landowner's loss of the use value of his or her property (*Kieselbach* v. *Commissioner*, 317 U.S. 399, 403-404 (1943), and in no way compensates for the appreciated value of the land.

value. Were the proceeds reinvested pursuant to 25 U.S.C. 409(a), equivalent substitute land could be acquired. However, were she to commence a proceeding to recover just compensation,[13] Mrs. Tabbytite's award would be based on the value of the land when Anchorage took over the road in 1975, prior to the current pipeline-induced land boom.

The Indian allottee need not, of course, take on the state single-handedly. The United States as trustee has a moral and legal obligation to protect the interests of Indian allottees. *Minnesota* v. *United States*, *supra*. See also *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943). However, as this Court has recognized, the government "is faced 'with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments,'" *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 374 (1968), quoting H.R. Rep. No. 2503, 82d Cong., 2d Sess. 23 (1952). The court of appeals' decision converts an overwhelming responsibility into an impossible burden, and should not be sustained.

[13] Presumably she could assert such a claim in the instant trespass action and thus avoid any statute of limitations problem.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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